Supreme Court, U.S.
FILED
DEC 19 1997
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No. 97-858

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

INO INO, INC., RHONDA REMUS, ESMERALDA SILVA, VICTORIA MCKNIGHT, and DEJA VU-BELLEVUE, INC.,
Petitioners,
v.

CITY OF BELLEVUE, WASHINGTON,
Respondent.

Petition For Writ Of Certiorari To The Washington Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

If a plaintiff obtains a temporary restraining order enjoining a valid city ordinance by misstating a state constitutional claim, is the trial court precluded by 42 U.S.C. § 1988 from applying state law and awarding the city its reasonable attorneys' fees incurred in lifting the injunction?

Did the Washington Supreme Court err in refusing to award attorneys' fees to plaintiffs under 42 U.S.C. § 1988, when they succeeded on only one of several claims asserted under the Washington State Constitution, and the court explicitly rejected all claims asserted under federal law?

PARTIES TO THE PROCEEDING

Respondent in this Court is the City of Bellevue, Washington, the defendant in three cases that were consolidated in Washington state court proceedings.

Petitioners in this Court are the plaintiffs in those proceedings. Ino Ino, Inc. was the owner and operator of an erotic nightclub, "Papagayo's," located in Bellevue. Petitioners Remus, Silva and McKnight were entertainers at "Papagayo's." Petitioner Deja Vu-Bellevue, Inc. planned to open another erotic nightclub in Bellevue.

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OPINION BELOW

The decision of the Washington Supreme Court is reported as *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154, *amended*, 943 P.2d 1358 (1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment.

Washington Constitution, Article I, Section 5.

42 U.S.C. Sections 1983 and 1988.

STATEMENT OF THE CASE

Petitioners filed three separate actions challenging the validity of an adult entertainment ordinance enacted by the City of Bellevue (the "City"). Their complaints alleged that the ordinance violated the Washington State and United States Constitutions.[1] Petitioners sought and obtained a temporary restraining order enjoining the City from enforcing a provision of its ordinance that established a four-foot

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[1] *See* Appendix for Petition for Certiorari (hereinafter "Pet. App.") 113, 120 and 127.

minimum distance between performer and patron for off-stage "table dances."[2] Pet. App. 164.

Petitioners challenged the distance restriction principally on the basis that it violated their rights under Article I, Section 5 of the Washington Constitution. Appendix, pp. 23-36.[3] Petitioners argued that the state constitution provides broader protection than the First Amendment. *Id.* at 23, 26, 27, and 29. Petitioner Ino Ino attempted to distinguish cases that had upheld even greater distance limitations by arguing that they had been decided under the *federal* constitution. *Id.* at 29-30.

After obtaining the temporary restraining order, petitioners moved successfully to consolidate the preliminary injunction hearing with a trial on the merits. Pet. App. 83.

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[2] A "table dance" is an individually compensated performance during which the performer dances in close proximity to the patron. The performance frequently involves the exposure of breasts and/or genitalia and unlawful sexual conduct. Pet. App. 4-7.

The temporary restraining order also enjoined a portion of the ordinance prohibiting actual or simulated acts of sexual conduct. Pet. App. 164.

[3] Petitioner Ino Ino's Motion for Temporary Restraining Order is attached in the Appendix hereto.

The trial court heard substantial evidence relating to the City's four-foot distance restriction upon "table dances" and the efficacy of the four-foot setback in preventing sexual conduct during those performances. Evidence at trial showed that table dances typically involve contact and unlawful sexual conduct between performers and patrons. Pet. App. 76-87.

After a six-day trial, the court rejected petitioners' arguments and vacated the restraining order. The court determined that the distance restriction was a permissible regulation of conduct under state law. Pet. App. 86 (¶ 9). The trial court also determined that there was "no need" to engage in an analysis of the distance regulation as a time, place or manner restriction under federal law. Pet. App. 86 (¶¶ 9-10). If such an analysis were undertaken, however, the court ruled that the City's ordinance would satisfy it.[4] Pet. App. 86 (¶ 10).

The City moved for and obtained a post-trial award of attorneys' fees under state law for its expenses in vacating a wrongful injunction. Pet. App. 95. The Washington

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[4] The trial court also found that the ordinance's prohibition on actual or simulated sexual conduct was valid under state law. Pet. App. 88 (¶ 15).

Supreme Court affirmed the propriety of this award, but it remanded the case to the trial court for recalculation of the City's fees. Pet. App. 44-46. Rather than contest the amount of fees owing, petitioners conceded that the City was entitled to the amount it claimed.[5] Pet. App. 104-106.

The Washington Supreme Court's analysis of the four-foot rule focused largely on petitioners' state constitutional arguments. *Compare* Pet. App. 8-18 and 21-24 (analyzing Article 1, Section 5 in the context of erotic expression) *with* Pet. App. 25-30 (analyzing four-foot restriction under the First Amendment). The Washington Supreme Court ultimately concluded that the Washington State Constitution does not require a departure from well-settled federal standards for analyzing distance restrictions on erotic speech. *See Kev, Inc. v. Kitsap Co.*, 793 F.2d 1053 (9th Cir. 1986); *BSA, Inc. v. King Co.*, 804 F.2d 1104 (9th Cir. 1986).

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[5] The amount sought by the City ($36,172.53) represented the fees expended to vacate the temporary restraining order in the trial court. The Washington Supreme Court declined to award attorneys' fees on appeal, and City neither sought nor obtained an award of the fees incurred in the trial court on other issues. *See* Pet. App. 44-48, 104-05. The total amount of attorneys' fees and costs incurred by the City in this matter exceeds $200,000.00.

The Washington Supreme Court denied petitioners' claim for attorneys' fees under 42 U.S.C. § 1988. The court noted that petitioners did not succeed on any federal claim. Pet. App. 48-49 and n. 18.

ARGUMENT AND AUTHORITIES

A. No Federal Issue is Raised By the Award of Attorneys' Fees to the City. The Award Was Made Under State Law After Petitioners Asserted and Failed to Prove State Claims.

Petitioners sought equitable relief in state court principally under the Washington Constitution, because case law denied them any right to relief under federal law. Petitioner Ino Ino's motion for a temporary restraining order demonstrates both points. First, Ino Ino asserted its claims against the City's four-foot distance requirement primarily under the Washington Constitution. Appendix 23 *et seq.* Second, Ino Ino distinguished applicable federal case law on the ground that those cases were decided under the "First Amendment rather than the broader protection of Article 1 Section 5 of the Washington Constitution." Appendix 29.

Petitioners' preemption arguments all share a fundamental flaw: they ignore that state and not federal rights

were really at issue. Because petitioners did not obtain the temporary restraining order under federal law, the fees provision in 42 U.S.C. § 1988 was never triggered.[6] Accordingly, the preemption cases they cite are not germane.

In any event, petitioners overstate their preemption argument. No case has held that a state-court equitable rule may not be enforced in an action brought under state law simply because plaintiffs also alleged federal rights.

Petitioners rely on *Varney v. O'Brien*, 147 Mich. App. 397, 383 N.W.2d 213, 217 (1985), for the proposition that section 1988 preempts a state procedural rule requiring an attempt to mediate before attorneys' fees may be awarded. Petitioners fail to disclose that *Varney* was vacated and effectively overruled, based on this Court's decision in *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985).

In *Marek*, this Court held that a fee award under section 1988 must be considered in light of an applicable

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[6] Just as petitioners sought injunctive relief primarily under the state constitution and attempted to distinguish authorities applying a federal constitutional standard, so the Washington Supreme Court discussed the state standard extensively before rejecting its application to the four-foot rule. Pet. App. 8-18 and 21-24.

procedural rule that might limit or preclude such fees. Rule 68 of the Federal Rules of Civil Procedure was enacted to encourage settlement and avoid litigation. *Id.* at 5. This Court found nothing incompatible in a statute awarding fees for meritorious lawsuits and a court rule encouraging the settlement of litigation.[7] *Id.* at 11. In short, the statute did not preempt the procedural rule.

After *Marek* was decided, the Michigan Supreme Court remanded the appeal in *Varney* with instructions to reconsider it in light of *Marek*. *Varney v. Genesee County Sheriff*, 426 Mich. 855, 393 N.W.2d 1 (1986). On remand the Michigan Court of Appeals held that both section 1988 and the state procedural rule must be applied by the trial court in determining what fees, if any, may be awarded. *Varney*, 402 N.W.2d at 60.

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[7] Similarly, despite the fact that 42 U.S.C. § 20004-5(k) forbids the award of fees to the federal government as a prevailing defendant in a civil rights action, many courts have held that the assessment of legal fees against a civil rights plaintiff may be imposed on a variety of legal grounds. *E.g.*, *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 535-36 (4th Cir. 1990) (awarding fees to United States under common-law bad faith exception to American rule and FED.R.CIV.P. 11), and cases cited therein.

The only other case cited by petitioners as applying preemption analysis to section 1988 rights was also eroded by a subsequent decision. Although the district court found preemption under section 1988 in *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning and Zoning Com'n*, 674 F. Supp. 1475, 1477 (M.D. Ga. 1987), the court of appeals affirmed on other grounds, without analyzing the preemption issue. 888 F.2d 1576, *as amended*, 896 F.2d 1264 (11th Cir. 1989).[8]

Petitioners sought equitable relief in state court upon state constitutional grounds. Appendix 23 *et seq*. The equitable relief they obtained was "wrongful" under Washington law. Pet. App. 44-45. Petitioners were subject to a long-standing state court rule that required them to pay for the costs of vacating a wrongful injunction. Like the court rules in *Marek* and *Varney*, the rule in this case is designed to encourage an economical resolution on the

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[8] The district court decision in *East-Bibb* has been criticized. In *Del Rio v. Jetton*, 55 Cal. App.4th 30, 63 Cal. Rptr.2d 712, 716-17 (Cal. App. 2 Dist. 1997), the court held that a state common-law claim for malicious prosecution, seeking damages which included attorneys' fees in defense of a prior 42 U.S.C. § 1983 civil rights action, was not preempted by 42 U.S.C. § 1988.

merits. *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407, *rev. denied*, 100 Wn.2d 1025 (1983).

Even if there were a basis to construe section 1988 as antithetical to a state rule such as that applied here, this is not the case to consider that issue. At a minimum, there is very serious doubt that federal law had anything to do with the trial court's decision to grant and then vacate equitable relief.

B. Because the Washington Supreme Court Rejected Petitioners' Federal Law Claims, They Have No Basis for Claiming Attorneys' Fees under 42 U.S.C. § 1988.

Petitioners appear to argue that the mere presence of a federal law claim requires the award of attorneys' fees under 42 U.S.C. § 1988 if a plaintiff prevails on a pendant state claim. Petitioners misread *Maher v. Gagne*, 448 U.S. 136, 100 S.Ct. 2579, 65 L.Ed.2d 653 (1980), and its progeny for this proposition.

Petitioners contended under state and federal constitutional law that the City's 14-day delay in issuing managers' licenses was a prior restraint. The Washington Supreme Court *rejected* petitioners' claim under *federal* constitutional law, citing *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392-94, 816 P.2d 18 (1991), *cert.*

denied, 503 U.S. 986 (1992) (holding that 30-delay in issuance of operator's license does not violate federal constitution). Pet. App. 49 n. 18. The court found that the delay violated the broader prohibition on prior restraint that exists *only under the Washington State Constitution. Id.*; *see also* Pet. App. 19-21.[9]

The text of 42 U.S.C. § 1988 limits the recovery of attorneys' fees to the enforcement of a *federal* right. A limited exception was recognized in *Maher v. Gagne*: fees may be recovered when a court refrains from deciding the federal issue but makes a determination for plaintiffs on a pendant state claim arising from the same facts. *Id.*, 448 U.S. at 132 n. 15 (pendant state law claim justified section 1988 award when court "declines" to decide federal issue). Petitioners cite no case holding that a section 1988 award is proper when all federal claims are *denied*. The rationale for the *Maher* rule--the avoidance of an unnecessary federal constitutional decision--disappears when the plaintiff's federal law claims are rejected, as in this case.

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[9] Of the combined 22 separate constitutional claims raised by petitioners in the trial court, this was the only claim on which they ultimately prevailed. *See* Pet. App. 49, 83-94.

None of the cases cited by petitioners support the award of section 1988 fees when all federal claims are expressly rejected. *Cf. Exeter-West Greenwich Regional School District v. Pontarelli*, 788 F.2d 47, 51 (1st Cir. 1986) (court abstained from deciding federal claims); *Seals v. Quarterly County Court of Madison Co.*, 562 F.2d 390, 392 (6th Cir. 1977) (decision on federal claim unnecessary); *Robert M. v. Benton*, 671 F.2d 1104, 1106 (same); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1124 (9th Cir. 1981) (same).

Courts that *have* considered and *rejected* federal claims routinely refuse to award section 1988 attorneys' fees, even though plaintiffs have prevailed on a state law claim. *See e.g., Kelly v. City of Leesville*, 897 F.2d 172, 177 (5th Cir. 1990); *Snohomish County v. Anderson*, 124 Wn.2d 834, 843-44, 881 P.2d 240 (1994); *see also Southeast Legal Defense*, *supra*, 657 F.2d at 1124 (award of fees on pendant claim assumes a meritorious but undecided federal claim).

Under petitioners' reading of *Maher v. Gagne*, success on any state law claim would trigger an award of section 1988 relief if a federal claim is merely alleged. No

court has applied *Maher* in this fashion. Unless a court rules in favor of the plaintiff on a federal-law claim or declines to decide a federal claim because it has resolved the case on non-federal grounds, no section 1988 award is proper. In this case, the Washington Supreme Court considered and rejected all federal claims asserted by petitioners. It would have been improper to award fees under section 1988 in such circumstances. The court did not err, and there is no basis for this Court to grant further review.

CONCLUSION

Petitioners raise no issue justifying the grant of certiorari. The award of partial attorneys' fees for the wrongful obtaining of preliminary injunctive relief by petitioners under state law in a state court served state policies protecting judicial resources and promoting the enforcement of valid laws. No federal right is implicated.

Petitioners did not prevail on any claim under the federal constitution or federal laws. They have no right to attorneys' fees under 42 U.S.C. § 1988.

DATED this 15th day of December, 1997.

Respectfully submitted,

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Motion for Temporary Restraining Order and Order to Show Cause in *Ino Ino, Inc. v. City of Bellevue*, King County Superior Court No. 95-2-02025-9 ..... App. 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Ino Ino, Inc., a Washington corporation,	)
	) No. 95-2-02025-9
Plaintiff,	) MOTION FOR TEMPORARY
	) RESTRAINING ORDER AND
v.	) ORDER TO SHOW CAUSE
City of Bellevue, a municipal corporation,	)
Defendant.	)

I.

RELIEF REQUESTED

The Plaintiff requests issuance of a temporary restraining order and order to show cause preventing the Defendant, its agents and employees, from enforcing Bellevue Ordinances 4692, 4695 and 4735 against the Plaintiff pending a hearing on the motion for a preliminary injunction. The Plaintiff also requests an order requiring the Defendant to appear and show cause as to why a preliminary injunction should not be issued, restraining the enforcement of City of Bellevue Ordinances 4692, 4695 and 4735 against the Plaintiff.

II.
STATEMENT OF FACTS

The Plaintiff, Ino Ino Inc., is a Washington corporation in good standing. The Plaintiff does business as Papagayo's, a restaurant and nightclub located at 2239 148th Avenue NE, Bellevue, Washington. In October 1994, the Plaintiff was issued an adult cabaret license although it did not at the time present adult entertainment. Recently, the Plaintiff has begun providing adult entertainment. The entertainment consists of nude dancing on stage and table dancing by female entertainers. The entertainers are not employees of the business, but independent contractors. The entertainers are compensated directly by customers for the table dances that they perform. Each table dance is an individualized performance which traditionally is performed in close physical proximity to the customer in order to create a sense of intimacy and rapport. Entertainers pay a portion of their earnings to the business as rent. The business does not serve alcoholic beverages.

On September 6, 1994, the Bellevue City Council enacted Ordinance 4692, which amended and supplemented the existing provisions of the Adult Cabaret Licensing Ordinance, BCC § 5.08.010 et seq. As amended by Ordinance 4692, Bellevue City Code, (hereinafter BCC), § 5.08.010A defines as an "adult cabaret" as:

> . . . any premises, including any cabaret premises, to which any member of the public is invited or admitted and where an entertainer provides adult entertainment to any member of the public.

As amended by Ordinance 4692, BCC § 5.08.010B defines "adult entertainment" as:

1. Any exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance involves a person who is unclothed or in such costume, attire or clothing as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast below the top of the areola or any portion of the public region, anus, buttocks, vulva or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

2. Any exhibition, performance or dance conducted in a premises where such exhibition, performance or dance is performed within the view of one or more members of the public and is intended or is likely to sexually stimulate any member of the public.

On September 19, 1994, the Bellevue City Council enacted Ordinance 4695, which further amended and revised the provisions of the adult cabaret licensing ordinance. As revised in 4695, § 5.08.070 contains various standards governing the conduct of the business, entertainers, and managers. Subsection A(6) of 5.08.070 provides:

No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless that dance, performance or exhibition is performed at a distance of no less than four feet from any member of the public.

Subsection D(2) of § 5.08.070 provides:

> Sufficient lighting shall be provided and equally distributed throughout the public areas of the premises so that all objects are plainly visible at all times. A minimum lighting level of 30 lux semi-cylindrical measured at 30 inches from the floor on 10 foot centers is hereby established for all areas of the adult cabaret where members of the public are admitted.

On January 23, 1995, the Bellevue City Council enacted Ordinance 4735, which is not scheduled to go into effect until February 23, 1995. Ordinance 4735 contains a new definition of "adult entertainment". The definition of "adult entertainment" is not a material issue in dispute because the Plaintiff agrees that it will provide "adult entertainment" under either the old or new definitions in the ordinance.

The Plaintiff maintains that subsection A(6) § 5.08.070 which requires all dances to be performed, "at a distance of no less than four feet from any member of the public" constitutes an unreasonable restrain on the exercise of fee speech rights. This provision of the ordinance was ostensibly adopted by the Bellevue City Council as a means to prevent entertainers and customers from engaging in illegal conduct. However, it goes far beyond what is necessary to achieve that purpose. Table dances are performed as dances for individual customers. Entertainers use space and close physical proximity to the customer to establish a sense of intimacy and rapport. Requiring a dance to dance four feet away substantially detracts from the aesthetic quality of the performance, and does not serve any legitimate governmental purpose. In addition, the requirement that the dancer remain four feet away from "any member of the public" is vague, impossible to comply with, and significantly reduces the

number of entertainers and customers that the business can accommodate at one time. When this ordinance was being considered by the Bellevue City Council, Dick Andrew, the Bellevue City Attorney, testified that the goal of maintaining of physical space between customers and entertainers could be effectively attained with a one foot setback requirement.

The "30 lux" illumination standard contained in subsection D(2) of 5.08.070 requires a much higher level of illumination than is necessary for persons and objects in the premises to be plainly visible to inspecting officers. The level or illumination required by the "30 lux" standard is glaring, uncomfortable and makes it impossible for the business to accentuate or spotlight the performance on the stage.

The Plaintiff maintains that the four foot clear distance requirement and the 30 lux illumination standard were not adopted by the Bellevue City Council to eradicate so called secondary effects alleged to be associated with adult entertainment. Instead, the Council members knew at the time that the ordinance was adopted that these unnecessary restrictions would tend to make it unprofitable for the Plaintiff to be able to operate its business. The following is a summary of the evidence relevant to this claim:

The original City of Bellevue Adult Cabaret licensing ordinance, Ordinance 4602, was adopted by the Bellevue City Council in November 1993. That Ordinance, which is fairly typical of adult entertainment licensing ordinances, permitted table dancing but prohibited nude dancing from taking place except upon a stage, six feet from the nearest customer and eighteen inches off the ground. At the time that 4602 was adopted, there were no nude dancing establishments operating in the City of Bellevue.

Sometime during the summer of 1994, the company which operates the Deja Vu nightclub chain applied for a building permit to construct an adult nightclub in the City of Bellevue, In July 1994, Andrea Vangor, the Executive Director of an organization known as Washington Together Against Pornography wrote a letter to Bellevue City Council member Margot Blacker. The letter recommended that the City of Bellevue adopt legislation imposing minimum distance requirements. Washington Together Against Pornography is an organization which advocates imposition of the strictest possible regulations against sexually oriented business and is, in fact, a pro-censorship organization. In October 1993, Washington Together Against Pornography hosted a seminar at the Bellevue Conference Center which was presented by attorneys with the National Family Legal Foundation, another pro-censorship organization. Bellevue City Council Member Margot Blacker is on the Advisory Board of Washington Together Against Pornography. Throughout the various public hearings dealing with licensing regulations applicable to adult nightclubs, Ms. Blacker never disclosed her connection with Washington Together Against Pornography, nor did she mention the fact that there had been ex parte communications between herself and Ms. Vangor.

Ms. Vangor wrote a letter to Mayor Davidson and all the City Council members on September 6, 1992, the day that the Bellevue City Council adopted Ordinance 4692. In this letter, Ms. Vangor made references to conversations that she had with Council Member Blacker, Mayor Davidson and Assistant City Attorney Lori Riordan with respect to the pending legislation. Again, none of these ex parte contacts were publicly disclosed. in the letter Ms. Vangor specifically took issue with the recommendation by City Attorney Dick Andrew that there be a one foot distance between

entertainers and customers and she recommended instead a four foot setback requirement.

Bob Wyrich, a representative of Washington Together Against Pornography, spoke to the Council at the public hearing on September 6, 1994, which preceded adoption of Ordinance 4692. According to the official minutes of that Council Session:

> . . . Mr. Wyrich urged the Council to retain the four-foot rule regarding table dancing and indicated that adult entertainment establishments will go out of business if the existing regulations are strictly enforced.

(Emphasis supplied).

Following the presentation of Mr. Wyrich, the Council rejected the one foot setback suggested by Mr. Andrew, and opted for the four foot setback that was being proposed by Washington Together Against Pornography. The four foot setback requirement was specifically proposed by Council Member Margot Blacker. According to the official minutes:

> Thanking the Legal Department, the citizens and Wash TAP for their work on this issue, Mrs. Blacker offered an amendment to Ordinance 4692 to change table dancing minimum distance from one foot to four feet. Mrs. Zumdieck seconded the amendment.

Most of the legislative business of the Bellevue City Council is conducted in what are referred to as "study sessions" at which no members of the public are permitted to address the Council. Public discussion of pending legislation is limited to five minutes at the public hearing which

immediately precedes enactment. Although there were extensive contacts between council members and Washington Together Against Pornography prior to the adoption of Ordinances 4692, 4695 and 4735, no representatives of the adult industry were ever invited by the Council to comment on the pending legislation nor were they even advised that the legislation was pending.

III.
STATEMENT OF ISSUES

The issue presented by this motion is whether or not the Plaintiff is entitled to issuance of a temporary restraining order and order to show cause.

IV.
EVIDENCE RELIED UPON

The evidence relied upon consists of the following:
Declaration of David Brown
Declaration of Kris Wheeler
Declaration of David Ebert.
Declaration of Gilbert H. Levy and attachments thereto.

V.
AUTHORITY AND ARGUMENT

A. The Plaintiff is entitled to the issuance of a temporary restraining order.

In order to obtain a temporary or permanent injunction, a party must show: (1) That he has a clear, legal or equitable right; (2) That he has a well-grounded fear of immediate invasion of that right; and (3) That the acts complained of either are or will result in actual or substantial

injury. Tyler Pipe Industries, Inc. v. Dept. of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982); Federation of State Employees v. State, 99 Wn.2d 878, 665 P.2d 1337 (1983). The purpose of a preliminary injunction is to preserve the status quo until trial can be had on the merits. McLean v. Smith, 4 Wn. App. 394, 482 P.2d 798 (1971). In order to prove a "clear legal right", the moving party must prove likelihood of prevailing on the merits. Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d 261, 721 P.2d 946 (1986).

The Plaintiff maintains that unless injunctive relief is granted, it will suffer immediate and ongoing deprivation of free speech rights, as well as economic injury. The federal courts have held that deprivation of First Amendment rights for even minimal periods of time constitutes a sufficient showing of threatened injury to justify issuance of a preliminary injunction. Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), Citizens for a Better Environment v. City of Parkridge, 567 F.2d 689 (7th Cir. 1975). In addition, deprivation of First Amendment rights, coupled with economic injury, has been held to be a sufficient showing of immediate or irreparable injury to justify issuance of a preliminary injunction. Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975).

Unless temporary relief is granted, the Plaintiff Factoria Center Investments will suffer injury that it will not be able to operate its business or exercise its free speech rights. Discussion of the likelihood of success on the merits is contained in the following portion of this motion.

B. Overview of applicable law.

Topless or nude dancing is a form of speech which is at least minimally protected under the First Amendment to the United States Constitution. Barnes v. Glen Theater, Inc., 501 U.S. ___, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991); O'Day v. King County, 109 Wn.2d 796, 749 P.2d ___ (1988).

Courts have analyzed licensing schemes similar to the one involved in this case in terms of whether or not they constitute an impermissible prior restraint of freedom of speech. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). A licensing requirement raises first amendment concerns when it inhibits the ability or inclination to engage in protected expression. KEV v. Kitsap County, 793 F.2d 1053, 1059 (9th Cir. 1986).

A prior restraint is a restraint of speech in advance of dissemination or in advance of a judicial determination that the speech is protected by the First Amendment. Tribe, American Constitutional Law, § 12-34 (2d ed.). Not all prior restraints violate the First Amendment, but they come into court bearing a heavy presumption against their constitutionality. Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2nd 649, 85 S. Ct. 734 (1965). There are two primary evils associated with primary restraints. FW/PBS Inc. v. City of Dallas, supra. The first is a scheme that places unbridled discretion in the hands of a governmental official or agency. Id. And see also Staub v. City of Baxley, 355 U.S. 313, 2 L. ed. 2d 302, 78 S. Ct. 277 (1958). The second is where the licensing scheme doesn't take place "under procedural safeguards designed to obviate the dangers of a censorship system". Freedman, supra, at 58. The essential safeguards are: (1) the licensing official must be required to issue or deny a license within a reasonable period of time, and

(2) there must be a provision for prompt judicial review. FW/PBS v. City of Dallas, supra.

License requirements such as the one involved in this case are also analyzed under the principals applicable to time, place and manner restrictions. Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989); Adult Entertainment v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (199). Under the First Amendment, time, place and manner restrictions are constitutional if they are narrowly tailored to further a substantial governmental interest and afford reasonable alternative channels of communication. City of Renton v. Playtime Theater, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

Article 1 Section 5 of the Washington Constitution provides greater protection for freedom of speech than the First Amendment. Bearing v. Share, 106 Wn.2d. 212, 234, 721 F.2d 918 (1986). Time, place and manner restrictions must be narrowly tailored to serve a "compelling" governmental interest. Id.

C. The licensing provisions of ordinances 4692 and 4735 are invalid because they fail to specify what the qualifications are for obtaining a license.

Four different kinds of licenses are required by Ordinances 4692 and 4735. A "cabaret" license is required under subsection (A) of 5.08.040 for businesses which are defined in BCC § 5.08.010(E) as a "cabaret". Businesses defined as "adult cabarets" are required to be licensed under subsection (B) of 5.08.040. Persons who work in "adult cabarets" as "managers" or "entertainers" are required to be licensed under subsection (C) of 5.08.040. BCC § 5.08.030

sets forth general qualifications applicable to all licensees. It provides:

> No license shall be issued to:
>
> A. A natural person who has not attained the age of twenty-one years, except that licenses may be issued to persons who have attained the age of eighteen years with respect to cabarets where no intoxicating liquors are served or provided.
>
> B. A person whose place of business is conducted by a manager or agent, unless such manager or agent possesses the same qualifications required of the licensee, or in the case of a manager or an adult cabaret, the manager has obtained a manager's license.
>
> C. A co-partnership, unless all the members thereof are qualified to obtain a license as provided in this chapter. Such license shall be issued to the manager or agent thereof.
>
> D. A corporation, unless all the officers and directors thereof are qualified to obtain a license as provided herein. Such license shall be issued to the manager or agent thereof.

Other than the general qualifications set forth in 5.08.030, Ordinance 4692 and 4735 permit the City Clerk to issue or deny licenses for adult cabarets, managers and entertainers based upon standards which are completely vague and undefined. For example, with respect to the adult cabaret license, BCC § 5.08.040(B)(8) provides in the pertinent part:

> Upon receipt of the complete application and fee, the clerk shall provide copies to the police, fire, and community development department for their investigation and review to determine compliance of the proposed adult cabaret with the laws and regulations which each department administers. Each Department shall, within thirty day of the date of such application, inspect the application and premises and shall make a written report to the clerk whether such application and premises complies with the laws administered by each department. No license shall be issued unless each department reports that the application and premises comply with the relevant laws.

(Emphasis supplied).

Under the subsection quoted above, the Clerk is free to deny an adult cabaret license based upon a determination that the business fails to comply with "relevant laws", but there is not indication in the text of the ordinance as to what the laws might be.

Similarly, subsection (B) (9) of 5.08.040 provides:

> An adult cabaret license shall be issued by the clerk within thirty days of the date of filing a complete license application and fee, unless the clerk determines that the applicant has failed to meet any of the requirements of this chapter or provide any information required under this subsection or that the applicant has made a false, misleading or fraudulent statement of material fact on the application for a license.

(Emphasis supplied).

Under the subsection quoted above, the Clerk is free to deny an adult cabaret license based upon non-compliance with "any of the requirements of this chapter," but there is no indication elsewhere as to what the requirements are. Similar language is also found in the section dealing with the issuance of denial of licenses for managers and entertainers. BCC § 5.08.040(C)(3) provides:

> An adult manager's or adult entertainer's license shall be issued by the clerk within 14 days from the date the complete application form and fee are received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, has made any, false, misleading or fraudulent statement of material fact in the application, or has failed to meet any of the requirements for issuance of a license under this chapter.

Statutes which authorize public officials to license conduct protected by the First Amendment must set forth definite, objective guidelines for the issuance of such licenses. Entertainment Concepts v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); Perrine v. Municipal Court, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971); Ebel v. City of Garden Grove, 120 Cal. App. 3d 399, 176 Cal. Rptr. 312 (1981); Seattle v. Bittner, 81 Wn.2d 747, 505 P.2d 126 (1973). Statutes which do not contain adequate standards and thereby vest licensing officials with unfettered discretion to issue or deny a speech related license are impermissible prior restraints.

This is not a case of inadequate standards, but simply no standards at all. The Bellevue City Code provides that the Clerk may refuse to issue an adult cabaret license if the

applicant fails to comply with "any requirements of this Chapter," or if applicant fails to comply with "relevant laws," but the Clerk has unlimited discretion to decide what those requirements or "relevant laws" might be.

D. The licensing provisions of Ordinance 4692 and 4735 are invalid because they require disclosure of extensive amounts of information which is unrelated to the qualifications to obtain a license.

The Plaintiff incorporates by reference the argument in the preceding section that there are essentially no requirements specified in the Bellevue City Code for issuance or denial of licenses for adult cabarets, managers and entertainers.

Bellevue City Code § 5.08.040 requires applicants for the adult cabaret, managers and entertainers licenses to submit a lengthy and detailed license application which requires the disclosure of information which has nothing to do with any qualifications to obtain a license. For example, subsection (B)(1)(b) requires disclosure as to whether or not a general partnership or corporation is in good standing under the laws of Washington although this has nothing to do with qualifications to obtain a license. Subsections (B)(1)(c) and (d) require disclosure of the applicant's interests in any other sexually oriented business, and disclosure of whether or not the applicant has ever had a license suspended or revoked, although this information has nothing to do with qualifications to obtain a license. Subsection (B)(1)(e) requires disclosure of prior criminal convictions, and forfeitures, other than minor traffic infractions, although the applicant may not be disqualified from obtaining a license on these grounds.

Compelled content-neutral disclosure of owner and employee information can chill protected expression. Taller v. California, 362 U.S. 60, 64, 4 L. Ed. 2d 559, 80 S. Ct. 536, 538-539 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461-462, 2 L. Ed. 2d 1488, 78 S. Ct. 1163, 1171-72 (1957). This chill can occur even if suppressing particular expression is unintended. NAACP, supra, at 461. Compelled disclosure of information in connection with an adult entertainment licensing ordinance cannot stand if the information sought is not reasonably related to the furtherance of a legitimate and substantial governmental interest. Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219, 226 (9th Cir. 1989); Genusa v. Peoria, 619 F.2d 1203 (7th Cir. 1980).

In Genusa v. Peoria, supra, the Court struck down portions of an adult bookstore licensing ordinance which required the disclosure of information which is substantially the same as that required by the Bellevue ordinance, for the reason that there was an invasion of the Plaintiff's privacy without any legitimate justification. 619 F.2d 1202, 1203. The information that was sought by the ordinance in that case, which was held to be unjustified, included all residences for the past three years, prior license history, a statement as to whether a license had previously been suspended or revoked, prior criminal convictions, and a list of officers and shareholders. Id. For the same reason, a shareholder disclosure requirement was held to be unconstitutional in Acorn Investments v. City of Seattle, supra.

The reasoning in Acorn Investments was implicitly adopted by the Washington Supreme Court in World Wide Video v. City of Tukwila, 117 Wn.2d 382, 816 P.2d 18 (1991). In that case, the ordinance required disclosure of the names and address of persons holding "an ownership,

leasehold or other interest", in the business. Recognizing that this broad language presented a potential constitutional defect under Acorn, the Court avoided the infirmity by construing the phrase "or other interest" to mean a "significant interest", with significance based upon responsibility for management of the business. Id. at 392.

Bellevue City Code § 5.08.040 requires disclosure of a great deal of information which is unrelated to the qualifications to obtain a license, and which cannot otherwise be justified by any substantial governmental interest. This includes the information which is sought by the following subsections: (B)(1)(a), (b), (c), (d), (e), (f) and (j). As to managers and entertainers, it includes the information required by subsections (C)(1)(d). In essence, the complex and detailed license application is a trap for the unwary, in that it provides pretext to deny issuance of a license on the ground that the application contains false or misleading information. The defendant should be restrained from enforcing these portions of its ordinance.

F. Ordinance 4692 fails to contain reasonable time limits for issuance or denial of a managers license

BCC 5.08.040C(3) provides:

> An adult cabaret manager's or an adult entertainer's license shall be issued by the clerk within 14 days from the date of the complete application and fee were received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, or that the applicant has made any false, misleading or fraudulent statement of material fact in the application for a license. The clerk may grant the applicant an

> extension of time in which to supply the required information. If the clerk determines that the applicant has failed to meet any of the requirements for issuance of a license under this subsection, the clerk shall deny the application in writing and shall cite the specific reasons therefor, including applicable laws. If a request for extension of time is not made, and the clerk has failed to approve or deny the license within fourteen days of filing of a complete application for an adult cabaret manager's license, the applicant may, subject to all other applicable laws, commence work as an adult cabaret manager in a duly licensed adult cabaret until notified by the clerk that the license has been denied. An applicant for an adult entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Said temporary license will automatically expire on the fourteenth day following the filing of a complete application and fee, unless the clerk has failed to approve or deny the license application in which case the temporary license shall be valid until the clerk approves or denies the application, or until the final determination of any appeal from a denial of the application.

BCC § 5.08.040(C)(4) authorizes issuance of a temporary entertainer's license immediately upon application, which remains in effect for fourteen days. However, there is no similar provision for issuance of a manager's license. Hence, even though the qualifications for issuance of manager's license are no different than the qualifications for issuance of an entertainer's license, there is a fourteen day waiting period with respect to the manager's license only.

FW/PBS Inc. v. City of Dallas, supra, provides that a speech related license must be issued or denied within a reasonable period of time in order to avoid invalidation on the grounds that it constitutes an impermissible prior restraint. In KEV Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9th Cir. 185), the Court of Appeals struck down a portion of a licensing scheme similar to this one which provided for a five day waiting period for issuance of an entertainer's license. The Court held that the five day waiting period unreasonably prevented the exercise of the First Amendment rights because the County provided no justification for the waiting period. Id. Similarly, in this case, there can be no justification for the fourteen day waiting period for issuance of manager's license because: (1) there are essentially no qualifications for issuance of a manager's license other than that the person be twenty one years old; and (2) there is no similar delay with respect to issuance of an entertainer's license even though the requirements for licensing managers and entertainers are the same.

In the absence of any reasonable justification, the fourteen day waiting period for issuance or denial of a manager's license constitutes an impermissible prior restraint.

F. The thirty lux illumination standard and the four clear distance requirements constitute invalid time, place and manner restrictions under First Amendment guidelines.

Bellevue Municipal Code § 5.08.070(A)(6) provides:

> No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the non-stage area of the adult cabaret unless that dance, performance or exhibition is

performed at a distance of no less than four feet from any member of the public.

The Plaintiff's business is intended to feature stage dancing and table dancing by female entertainers. The female entertainers are not employees of the business, but are engaged in their own business, which consists of performing table dances for individual patrons. Typically, the entertainers do not charge for the stage dances, but only for table dances. They are compensated directly by the customers and pay rent to the business in return for the use of the dressing room and performance areas. The table dances are unique performances intended to create a sense of intimacy between the entertainer and the individual patron for whom the dance is performed. The manner in which table dances are performed and the entertainers are compensated is not unique to the City of Bellevue, but exists as the custom and practice of the industry.

The four foot clear distance requirement contained in subsection (A)(6) presumably was adopted to prevent illegal contact between the patrons and entertainers, while the entertainers are performing table dances. However, the ordinance goes beyond requiring physical separation between the entertainer and the patron who is the recipient of the table dance; it also requires a four foot separation between the entertainer and "any member of the public". This language in the ordinance has the unintended consequence of drastically reducing the number of entertainers and patrons who may be accommodated in the assembly area of the business because it requires a moving circle of clear space, with a four foot radius, around each entertainer. Indeed, the reduction in patrons and entertainers required by this provision in the ordinance is so drastic as to prevent the business from operating. In addition, the four foot clear distance

requirement is a restriction on the content of expression because the sense of intimacy and the personal nature of the dance, which the performer attempts to convey, is significantly less effective if the performer is separated by four feet from her intended audience.

Licensing restrictions of this nature are analyzed under the principals applicable to time, place and manner restrictions. Acorn Investments v. City of Seattle, supra, Adult Entertainment Center v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (1990). Under the First Amendment, time, place and manner restrictions are valid if they are content neutral, if they are narrowly tailored to further a substantial governmental interest, and if they afford reasonable alternative channels of communication. City of Renton v. Playtime Theater Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

An ordinance is deemed to be content neutral if it is justified without reference to the content of the speech. City of Renton, supra, at 47. However, an ordinance may be deemed to be content based rather than content neutral if the "predominate purpose" of enactment was the suppression of constitutionally protected speech. Id. at 48. The determination of whether an ordinance is content based rather than content neutral is fact specific and turns on whether or not there is sufficient evidence in the legislative record to justify the restriction imposed. Walnut Properties v. City of Whittier, 808 F.2d 1311 (9th Cir. 1986).

The government bears the burden of establishing that its time place and manner restriction is "narrowly tailored" to further a substantial governmental interest and that it leaves open, "ample alternative channels of communication." Ward v. Rock Against Racism, 491 U.S. 781, 105 L. Ed. 2d 661,

109 S. Ct. 2746 (1989). An ordinance is not narrowly tailored if it burdens substantially more speech than is necessary to further the government's legitimate interest. Id. There must be a "reasonable fit" between the legislative end and the means chosen by government to accomplish that end. Board of Trustees SUNY v. Fox, 492 U.S. 469, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989). On a number of occasions, Courts have invalidated time, place and manner ordinances where the restrictions imposed by the legislation were broader than necessary to accomplish the intended legislative goals. Acorn Investments, Inc. v. City of Seattle, supra, at 221, Tollis Inc. v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987); World Wide Video v. Tukwila, supra, at 388-390.

In this case, the four foot clear distance requirement of subsection (A)(6) goes beyond prohibiting physical contact between entertainers and patrons who are the recipients of table dances. It requires an artificial and unnecessary clear distance between entertainers and "any member of the public," which drastically reduces the number of entertainers and patrons that the business may accommodate. It also imposes an unnecessary restraint on the content of the entertainers' expression by preventing them from using physical proximity as a means of creating a sense of intimacy and personal rapport with their customers. For these reasons, the Defendant is not in a position to demonstrate that its restriction is "narrowly tailored" to further a substantial governmental interest, or that it leaves open ample alternative channels of communication. The evidence to be presented at the show cause hearing will also demonstrate that the ordinance is content based rather than content neutral because it was adopted entirely at the insistence of an organization known as Washington Together Against Pornography, a pro-censorship organization.

G. The four foot clear distance requirement is an invalid time, place and manner restriction under Article 1, Section 5 of the Washington Constitution.

1. In this case, Article 1, Section 5 of the Washington Constitution confers greater protection than the First Amendment.

Nude expression is protected speech under Article 1 § 5 of the Washington Constitution. O'Day v. King County, 109 Wn.2nd 796, 749 P.2d 142 (1988). Generally speaking, Article 1 § 5 of the Washington Constitution is more protective of freedom of speech than the First Amendment. Pre-publication prior restraints are absolutely prohibited by Article 1 § 5 of the Washington Constitution. State v. Coe, 101 Wn.2d 364, 679 P.2d 853 (1984); Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986). Time, place and manner restrictions are measured under the more rigorous compelling governmental interest test, rather than the substantial governmental interest tests, which is applied under the First Amendment. See Bering v. Share, supra., at p. 234; Collier v. Tacoma, 121 Wn.2d 737, 854 P.2d 1046 (1993); Adult Entertainment Center v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (1990). Article 1 § 5 of the Washington State Constitution is less tolerant than the First Amendment of overly broad restrictions on speech. O'Day v. King County, supra., at p. 804.

In order to determine in a given situation whether Article 1 § 5 of the Washington Constitution provides greater protection than the Federal Constitution, reference must be had to be six (6) non-exclusive criteria of State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). See Forbes v. Seattle, 113 Wn.2d 54, 720 P.2d 808 (1986) and Collier v Tacoma,

supra, at p. 7046. The Gunwall factors: 1) The textual language; 2) Differences in text; 3) Constitutional history; 4) Pre-existing state law; 5) Structural differences; and 6) Matters of particular state and local concern. In this case, the Plaintiff maintains that Article 1 § 5 confers greater protection, based upon the following is a discussion of the relevant Gunwall factors:

Textual Language

Article 1 § 5 of the Washington Constitution provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

One of the fundamental premises of First Amendment cases dealing with nude dancing is that such activity is entitled to only the minimum amount of constitutional protection. See Barnes v. Glen Theater, Inc., 501 U.S. ___, 115 L. Ed. 2d 504, 111 S. Ct. ___ (1991). To a large extent, the federal courts have not been particularly sensitive to restrictions on nude dancing because the right to engage in nude dancing is considered to be a less important constitutional right. However, Article 1 § 5 of the Washington Constitution extends to the right to speak freely, "on all subjects." On at least two occasions, the Washington Supreme Court has rejected any suggestion that sexually-oriented speech is entitled to a lesser degree of constitutional protection than other forms of speech. Northend Cinema v. Seattle, 90 Wn.2d 709, 718, F.N. 6, 585 P.2d 1153 (1978); Worldwide Video v. Tukwila, 117 Wn.2d 382, 390, 810 P.2d 18 (1991).

Differences in Text

The dissent in State v. Reece, 110 Wn.2d 766, 757 P.2d 947 (1988), pointed out:

> This court has held in the most recent cases addressing this issue that the very different language of the two constitutions require giving our constitution a broader interpretation.

110 Wn.2d 788.

Constitutional History

The constitutional history of Article 1 § 5 is discussed in the Reece dissent and in State v. Rinaldo, 36 Wash. App. 86, 673 P.2d 614 (1984). The court in Rinaldo observed that the State Constitutional Convention that was convened in 1899 considered three different free speech provisions and adopted the one that was most protective of speech. The court stated:

> Those hearty frontier lawyers, newspaper people, and their colleagues of the 1899 Constitutional Convention said it as clearly as they possibly could--the right to free speech and press in the State of Washington is a privilege guaranteed to all, and so long as it is not abused, it is absolute. Then to insure that this right would not be tampered with by future legislators or courts, they wrote the privilege into our state constitution.

673 P.2d 618.

Pre-Existing Case Law

In Adult Entertainment Center v. Pierce County, supra., the Court of Appeals, Division II, employed the heightened scrutiny of the compelling governmental interest test to measure the constitutionality of a Pierce County licensing scheme which regulated sexually-oriented motion picture arcades. Adult Entertainment Center was cited with approval in the recent Washington Supreme Court decision, Collier v. Tacoma, supra., at pp. 753, 754. The regulation under consideration in Adult Entertainment Center was very similar to the regulation involved in this case; i.e., it employed licensing and configuration requirements to deal with the so-called secondary effects of sexually-oriented businesses. The court in Adult Entertainment Center determined that heightened scrutiny was the appropriate method of analysis in dealing with adult entertainment licensing regulations, and there is no reason to take a different approach in this case.

Structural Differences

As the majority observed in State v. Reece, the Federal Constitution is grant of enumerated powers, and the State Constitution acts as a limitation on the otherwise plenary powers of government. 110 Wn.2d 780. This means that the Washington Supreme Court has to engage in independent state analysis and confer greater protection where appropriate. It is particularly appropriate for the Washington courts to intervene when the United States Supreme Court has decided to limit federal guarantees in a manner inconsistent with prior pronouncements. 110 Wn.2d 781. Barnes v. Glen Theater, supra., represents a radical departure from previous decisions of various federal courts which held that topless dancing is fully-protected speech under the First Amendment. Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981); Grand Faloon Tavern, Inc. v. Wicker,

670 F.2d 943 (11th Cir. 1982); Miller v. Civil City of Southbend, 904 F.2d 1081 (7th Cir. 1990); Salem Inn, Inc. v. Frank, 501 F.2d 18 (2nd Cir. 1974). To the extent that Barnes represents an erosion of previously existing constitutional protections, it is particularly appropriate for the Washington courts to adopt independent state analysis.

Matters of Particular State or Local Concern

In Washington, activities of this nature have been traditionally regulated by the municipalities. It is difficult to imagine why there would be a federal interest in this area at all, or why it would not be a matter of exclusively local concern.

The preceding discussions suggests that in this case, Article 1 § 5 of the Washington Constitution provides greater protection than the First Amendment. The Plaintiff maintains that this greater protection should manifest itself in three ways. First, the Court should apply the compelling governmental interest test rather than the less rigorous substantial governmental interest test, which is applied in the federal cases. Secondly, to the extent that the asserted defect in the ordinance is one of overbreadth, this Court should adopt the "less tolerant" approach, which is suggested by the Supreme Court's decision in O'Day v. King County, supra., at p. 804.2. Finally, the court should determine whether or not the restriction contained in subsection (A)(6) of 5.08.070 constitute the "least restrictive means" or accomplishing the asserted legislative goals.

2. The restrictions on table dancing are invalid under Article 1, Section 5 of the Washington Constitution because they are not justified by a compelling governmental interest and they fail

to afford reasonable alternative avenues of communication.

Generally speaking, topless dancing licensing ordinances, such as the one at issue in this case, are analyzed under the principles applicable to time, place and manner restrictions. See BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986); KEV Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986); Adult Entertainment Center v. Pierce County, supra. Under Article 1 § 5 of the Washington Constitution, time, place and manner restrictions are valid only if they are content-neutral, are narrowly tailored to serve a compelling governmental interest, and leave open ample alternative avenues of communication. Bering v. Share, supra, at p. 234, Collier v. Tacoma, supra, at p. 747. To achieve a compelling governmental interest, the purpose of the ordinance must be a fundamental one, and the legislation must bear a reasonable relation to that purpose. Collier v. Tacoma, supra, at p. 753. The reasonableness of a time, place and manner restriction is determined by balancing the public interest advanced by the legislation against the restriction of free speech rights. Id. The government has the burden of meeting each element of the time, place and manner test. Id. In determining that there are alternative avenues or communication, the court will consider whether or not these avenues are "practically available." Id. at 759.

In KEV, Inc. v. Kitsap County, supra, the Ninth Circuit upheld a Kitsap County adult entertainment ordinance, which contained restrictions which are somewhat similar to the ordinance involved in this case. The Kitsap County ordinance provided that no dancing was to occur closer than ten feet to the nearest patron, and it also prohibited the direct payment of gratuities to dancers.

793 F.2d 1061. In upholding these restrictions, the Court of Appeals stated:

> The alleged purpose of these requirements is to prevent patrons and dancers from negotiating for narcotics transfers and sexual favors on the premises of erotic dance studio. Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. Similarly, prohibiting dancers and patrons from engaging in sexual fondling and caressing in an erotic dance studio would probably deter prostitution. Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.
>
> Further, these regulations do not significantly burden First Amendment rights. While the dancers' erotic message may be slightly less effective from ten feet, the ability to engage in protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market. See Ellwest Stereo Theaters, 681 F.2d 1246, (regulation did not affect access to adult films). Similarly, while the tipping prohibition may deny the patron one means of expressing pleasure with a dancer's performance, sufficient alternative methods of communication exist for the patron to convey the same message. Thus, the regulations of reasonable time, place and manner restrictions, that only slightly burden speech.

793 F.2d 1061, 1062.

There are several reasons why the KEV case is distinguishable. First, it was based upon the First

Amendment rather than the broader protection of Article 1 § 5 of the Washington Constitution. Secondly, the plaintiff in that case apparently made no showing as to the impact of the regulation on protected speech. There was no demonstration by the plaintiff in that case that compliance with the ten-foot set-back requirement would interfere with the dancer's erotic message and compromise the quality of the performance. The court in KEV did not understand that the dancer's "market" consisted of the patrons and thus, the regulation would deny reasonable access to the market. The court in KEV erroneously assumed that the money that dancers received from patrons was extra income or "tips," and not their principal source of revenue.

The plaintiffs challenged a stage requirement in the King County ordinance in O'Day v. King County, supra. The court in O'Day declined to analyze this portion of the ordinance as a time, place and manner restriction because of the lack of any showing that the ordinance impacted protected speech. The Washington Supreme Court stated:

> Before we consider whether the stage requirement is a valid time, place and manner restriction, we must determine whether it regulates protected expression or whether it regulates only conduct. Pure conduct does not enjoy the protections of either Article 1 § 5 or the First Amendment. Seattle v. Buchanan, 90 Wn.2d 584, 584 P.2d 918 (1978).
>
> Unlike similar local regulatory regimes that have been invalidated, the stage requirement does not prohibit nude entertainment. (Cites omitted). The stage requirement allows any type of expression by nude entertainers as long as the nude expression is made in minimal distance from patrons.

> Respondents have failed to demonstrate how the stage requirement infringes on their right to free expression rather than simply their conduct. (Cite omitted). The requirement is aimed not at expression, but only public sexual contact between entertainers and patrons by keeping nude entertainers out of reach of the nearest patron. (Cite omitted). We conclude that the eighteen inch stage requirement of K.C.C. 6.08.050(A)(6) regulates only conduct, and not expression protected by Article 1 § 5.

109 Wn.2d 809, 810.

The critical distinction between the ordinance in this case and the King County ordinance considered in O'Day is that the King County ordinance did not completely ban table dancing, but only nude table dancing. The set-back requirement in the King County ordinance does not apply to dancers who are clothed. Finally, the plaintiff in O'Day made no showing that the set-back requirement would adversely impact and diminish the quality of protected speech, nor was there any showing that the King County Ordinance under consideration in O'Day would prevent the dancers from making a living.

The Bellevue ordinance involved in this case is also similar to a Snohomish County ordinance that was challenged in 1987 in the King County Superior Court under Article 1 § 5 of the Washington Constitution. The name of that case was Treshea M. Davis v. Snohomish County, King County Cause No. 87-2-01335-9, consolidated with PD&MK v. Snohomish County, King County Cause No. 87-2-04201-4. The trial in that matter was held before the Honorable Susan Agid, who is now on the Washington Court of Appeals,

Division I. Judge Agid's findings and judgments are attached to this Memorandum and incorporated by reference herein. In the Davis case, the Snohomish County ordinance required licenses for "erotic dance studios" and "erotic dancers" and the definition of those phrases in the Snohomish County ordinance is similar to the definitions contained in the current Bellevue Ordinance. See Findings of Fact and Conclusions of Law, p. 5. The Snohomish County ordinance provided that "erotic dancing" would occur only on a stage eighteen inches off the ground and six feet from the nearest customer. Findings of Fact and Conclusions of Law, pp. 5, 6.

In her findings in the Davis case, Judge Agid observed that a principal distinction between the Snohomish County ordinance and the Kitsap ordinance under consideration in Kev is that the Kitsap ordinance applied to "all dancing," whereas the Snohomish County ordinance applied to only "erotic dancing." Findings of Fact and Conclusions of Law, at p. 8. Judge Agid agreed with the plaintiffs that the phrase "erotic dancing" was vague in that it failed to provide adequate guidance to law enforcement officials. However, she solved the vagueness problem through judicial construction. Findings of Fact and Conclusions of Law, at p. 9. The judicial construction consisted of limiting the phrase "erotic dancing" to certain core behavior, which included:

(a) Nudity;

(b) Displaying or exposing, with less than full opaque covering, that portion of the female breast below the upper edge or the areola;

(c) Displaying or exposing, with less than full opaque covering, the dancer's public area, pubic hair, or anus;

(d) Any dancer fondling or caressing any patron, or an patron fondling or caressing any dancer;

(e) A dancer touching herself on the breast, pubic area, or anal area, or allowing a patron or other dancer to touch her in those areas;

(f) Simulating, by touching or otherwise, masturbation or intercourse;

(g) Bringing any portion of the dancer's body closer than six inches to the patron or rubbing any portion of the dancer's body on a patron;

(h) Sitting on a patron's lap or separating a patron's legs.

Findings of Fact and Conclusions of Law, at p. 10.

In her findings, Judge Agid concluded that once the phrase "erotic dancing" was given the narrowing construction described above, the legislative record was devoid of any evidence that non-erotic dancing caused the so-called adverse secondary effects that were the reason for enactment of the ordinance. Finding of Fact No. 30 provides:

> The regulations of Chapter 6.25 SCC formulated by the County Council were based upon the secondary effects of erotic dancing, as defined by the core activity described above, and not on secondary effects of non-erotic dancing.

Finding of Fact No. 31 provides:

> The County Council did not find that there was a nexus between prostitution, drug dealing and crime problems and non-erotic dancing. Based upon the evidence, the Court cannot find that such a nexus exists.

Finding of Fact No. 32 provides:

> There was not sufficient evidence to establish a nexus between tipping for non-erotic table dancing and the evils that Snohomish County seeks to prevent by regulating erotic dancing.

Since restrictions on non-erotic dancing could not be justified by the reasons for enactment of the ordinance, Judge Agid determined that the ordinance would be overbroad as applied to non-erotic dancing. Finding of Fact No. 35 provides:

> Under the analysis set out in Conclusion of Law No. 13, the regulations at issue are content neutral. They are aimed at the way that dancers and management have conducted themselves in exercising their free speech rights (e.g., dirty dances, assaultive behavior, drug and prostitution deals) and not at the content of the dance itself. While the restrictions are aimed only at erotic dancers, they are justified by the secondary effects of the erotic dance in the clubs at which it takes place. A restriction that was similar to this, that applied to all dancing in Snohomish County, including that which was not shown to have the secondary effects of disruptive or illegal conduct, would be overbroad.

(Emphasis supplied).

In the findings and in the judgment, Judge Agid did not rule that the six-foot setback requirement was unconstitutional because, under the narrowing construction, it did not apply to dancing which did not involve the core behaviors associated with adverse secondary effects. Following entry of the judgment in the Davis case, Snohomish County elected not to appeal, but instead amended its ordinance to incorporate Judge Agid's decision. As revised, Snohomish County Code § 6.01.010(25) defines "erotic dance" and "erotic dancing" to encompass only the so-called core behaviors that are set forth in Judge Agid's decision.

Lacking an authoritative judicial construction, such as the one adopted by Judge Agid, the provisions in the Bellevue ordinance, which impose a four-foot set-back requirement on "all dancing" are overly broad. The legislative record is devoid of any evidence that all dancing, regardless of its content, will cause the secondary effects which are the reason for the enactment of the ordinance. Analyzing the issue under the principles set forth in Collier v. Tacoma, supra, the ordinance in its present form does not serve a compelling governmental interest because the restrictions imposed by the legislation are not justified by the legislative purpose. In a similar vain, the Washington Supreme Court in Worldwide Video v. Tukwila, supra, ruled that a set of zoning restrictions that applied to retail only adult businesses were not narrowly tailored to serve a significant governmental interest because there was no indication in the legislative record that retail-only adult businesses would cause the same adverse secondary effects as those which had facilities for on-premises viewing. Also, in this case, the legislation is defective because the defendant is not in a position to sustain its burden of demonstrating the availability of alternative

avenues of communication. The plaintiffs have made a preliminary showing that revenue from table dancing is the primary source of income for the business and the dancers, and the industry as a whole is dependent on table dancing. Thus, the Defendant is not in a position to demonstrate that alternative avenues or communication are "practically available."

3. The four-foot clear distance requirement is an invalid time place and manner restriction because it does not constitute the "least restrictive means" for attaining the goals of the legislation.

A statute which burdens the exercise of a fundamental right is subject to "strict scrutiny." Dunn v. Blumstein, 405 U.S. 330, 343, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); Darrin v. Gould, 85 Wn.2d 859, 540 P.2d 882 (1975); Duranceau v. Tacoma, 27 Wn. App. 770, 620 P.2d 533 (1980). Under the strict scrutiny test, the government must prove that 1) a compelling state interest exists to justify the legislation; and 2) the regulation constitutes the least restrictive means to accomplish the government's objective. First Covenant Church v. Seattle, 114 Wn.2d 393, 402, 787 P.2d 1352 (1990).

In this case, the Defendant is not in a position to demonstrate that the four-foot clear distance requirement is the least restrictive means capable of attaining the legislative goals. For one thing, there is no reason why the entertainer would have to be set back four feet from persons who are not receiving the table dance. Furthermore, the City is not in a position to demonstrate that a lesser distance would not be just as effective in preventing illegal contact between entertainers and patrons. The Plaintiff is prepared to present

evidence that at the City council session which was considering the enactment or Ordinance 4692, Bellevue City Attorney Dick Andrews testified that the City would be able to accomplish its legislative goals with a one-foot setback requirement, and the four-foot clear distance requirement was not the "least restrictive means."

VI.
CONCLUSION

The Court should issue the temporary restraining order and order to show cause requested by the Plaintiff.

DATED this ____ day of February, 1995.

[Filed 2/17/95, unsigned and undated.]
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